No. 81-5844

Dec. 7, 1981
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SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLIE B. BOWEN,

Petitioner,

-V.-

WALTER F. ZANT, WARDEN,

Respondent.

On Writ of Certiorari

To the Superior Court of Butts County, Georgia

PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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TABLE OF CONTENTS

QUESTIONS PRESENTED. 1

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS. 3

STATEMENT OF THE CASE. 4

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW. 7

REASONS FOR GRANTING THE WRIT:

THE PETITIONER WAS INDICTED BY AN UNCONSTITUTIONALLY COMPOSED GRAND JURY SINCE IT WAS DRAWN FROM A GRAND JURY POOL WHICH WAS COMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE LAWS AND CONSTITUTION OF THE STATE OF GEORGIA 8

THE PETITIONER WAS TRIED AT BOTH TRIALS BY UNCONSTITUTIONALLY CHOSEN JURIES SINCE THEY WERE CHOSEN FROM TRAVERSE JURY POOLS WHICH WERE COMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF GEORGIA. 10

THE TRIAL COURT'S FAILURE TO GRANT THE PETITIONER'S MOTION FOR FUNDS TO INVESTIGATE AND SHOW A HISTORY OF SYSTEMATIC EXCLUSION OF COGNIZABLE GROUPS FROM JURY POOLS IN POLK COUNTY, GEORGIA, VIOLATED THE PETITIONER'S RIGHT TO FULLY PRESENT HIS CHALLENGE TO THE TRAVERSE JURY BEFORE HIS SECOND TRIAL, RIGHT TO A FAIR TRIAL, DUE PROCESS AND EQUAL PROTECTION OF LAW AND RIGHT TO A JURY COMPOSED OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY. 13

CONCLUSION 13

AFFIDAVIT OF COUNSEL 14

AFFIDAVIT OF TIMELY FILING 16

CERTIFICATE OF SERVICE 17

QUESTIONS PRESENTED

1. Was the Petitioner indicted by a grand jury drawn from a grand jury pool which was composed in violation of the Constitution of the United States?

2. Was the Petitioner tried by a jury chosen from traverse jury pools which were composed in violation of the Constitution of the United States?

3. Did the trial court's failure to grant the Petitioner's motion, prior to his second trial, which motion was for funds to investigate and show a history of systematic exclusion of cognizable groups from jury pools in Polk County, violate the Petitioner's right to fully present his challenge to the grand and traverse jury pools, his right to a fair trial, due process and equal protection of law ans right to a jury composed of a representative cross section of the community as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

TABLE OF AUTHORITIES

CASES

Bowen v. The State, 244 Ga. 495 (1979). 4

Castaneda v. Partida, 430 U.S. 482 (1977) 10

Rose v. Mitchell, 99 S. Ct. 2993 (1979) 10

State v. Messer, Superior Court of Polk County, Criminal Indictment No. 2072 9

STATUTES

Fifth Amendment of the United States Constitution 3

Sixth Amentment of the United States Constitution 3

Fourteenth Amendment of the United States Constitution. 3

18 U.S.C. 243. 3

Ga. Code Annotated Section 50-127(1) 4

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLIE B. BOWEN,

Petitioner,

V.

WALTER F. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner prays that this Honorable Court issue a Writ of Certiorari to review the judgments of the Superior Court of Butts County, Georgia, entered April 27, 1981, denying Peittioner's Motion for a Writ of Habeas Corpus.

OPINIONS BELOW

The Opinion of the Superior Court of Butts County is filed as Habeas Corpus File No. 4780 of that Court and is set out in tha Appendix as Appendix A. The Order of the Supreme Court of Georgia denying Petitioner's Application for a Certificate of Probable Cause is filed as Application No. 1685 of that Court and is set out in the Appendix as Appendix B.

JURISDICTION

The final judgment of the Superior Court of Butts County was entered on April 27, 1981. Petitioner's application to the Supreme Court of Georgia for a Certificate of Probable Cause was denied on September 8, 1981. The jurisdiction of this Court is invoked pursuant to 28 USC 1257 (3) to review teh denial of certain enumerated rights guaranteed Petitioner under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness aganst himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. This case also involves the Sixth Amendment to the Constitution of the United States of America:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the STate and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence."

3. This case also involves the Fourteenth Amendment to the Constitution of the United States of America, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, lieberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws."

4. This case also involves 18 U.S.C. §243, to wit:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.00."

5. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. §50-127 (1):

> "Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, right conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final."

STATEMENT OF THE CASE

Procedural History --

The Petitioner was convicted of murder and rape in the Superior Court of Polk County and on September 8, 1977, was sentenced to death for the murder and life imprisonment for the rape.

The conviction for murder and rape and the sentence for rape were affirmed by the Georgia Supreme Court. The death penalty for murder was vacated and the case remanded to the Superior Court for retrial solely on the issue of punishment for the murder. Bowen v. State, 241 Ga. 492, (1978).

On retrial on sentencing, the Petitioner was resentenced to death on September 14, 1978.

The sentence was affirmed by the Georgia Supreme Court. Bowen v. State, 244 Ga. 495 (1979).

Certiorari was denied by the United States Supreme Court.

A petition for writ of habeas corpus accompanied by a motion to proceed in forma pauperis and a motion for funds for investigation and hearing expenses was subsequently filed on September 3, 1980.

An evidentiary hearing was held on January 20, 1981, at which time the Petitioner's motion for funds was denied.

Petitioner, an indigent, was therefore unable to procure the services of investigators, subpoena witnesses and hire experts.

The Petitioner's habeas was denied on April 27, 1981, by the Superior Court of Butts County, Georgia (Appendix A.).

Petitioner's application for a Certificate of Probable Cause from the Supreme Court of Georgia was denied by an Order entered by that Court dated September 8, 1981 (Appendix B.).

Statement of Facts --

The Petitioner, Charlie B. Bowen, a black man with no prior criminal record, was convicted and sentenced for the murder and rape of a thirteen (13) year old child. Charlie Bowen's factual involvement in her death was not disputed.

Charlie Bowen had been suffering from psychiatric problems for a period of time prior to the offense. Mr. Bowen's deteriorating mental health was observed by his employer and the people close to him.

Immediately after the offense was committed, Charlie Bowen became so overwhelmed with guilt and remorse for what he had done, that he attempted to kill himself by drinking a bottle of iodine.

Several hours later, realizing that he was not going to die from this self-inflicted poisoning and realizing that he

was seriously mentally ill, Charlie Bowen voluntarily admitted himself to the psychiatric unit of the Northwest Georgia Regional Hospital. It was there that he was arrested. Charlie Bowen cooperated fully with the police.

Charlie Bowen was indicted by a grand jury grossly under-representative of women and black people, drawn from a jury pool grossly underrepresentative of women and black people.

Charlie Bowen's trial jury was drawn f rom a jury pool grossly underrepresentative of women and black people. Only 2 of 48 persons on the jury panel were black, both were stricken peremptorily by the prosecutor.

At trial, Charlie Bowen's defense was insanity. Although both the State and defense psychiatrists testified that Mr. Bowen was suffering from mental illness, only the psychiatrist called by Mr. Bowen testified that Charlie Bowen was legally insane (it should be noted that defense counsel had no input in choosing either psychiatrist).

In mitigation, Charlie Bowen presented witnesses to show that he had a good reputation and a pleasant non-violent disposition; he maintained regular employment, was a superior worker, got along well with others and was highly regarded; generally he was a hard-working, law abiding, productive citizen. The witnesses also showed the deterioration of Charlie Bowen's mental health.

The all white jury convicted Charlie Bowen and sentenced him to death.

On retrial on sentencing only, the jury was drawn from a jury pool grossly underrepresentative of women and black people. Only 4 of 48 persons on the jury panel were black. All four of these persons were peremptorily stricken by the prosecutor. The all white jury was composed of 9 men and 3 women in a

county 54 per cent female. Charlie Bowen's court appointed trial counsel filed a challenge to the Grand and traverse juries and a motion for funds to investigate and show a history of systematic exclusion of cognizable groups form jury pools in Polk County. This motion was denied.

At the second trial, Charlie Bowen presented the same mitigating evidence presented at the first trial and additional mitigating evidence including the fact that he has been a model prisoner since his arrest.

The all white jury again sentenced Charlie Bowen to death.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner raised the claim that he was indicted by a Grand Jury drawn from a grand jury pool which was composed in violation of the Constitution of the United States and the laws and Constitution of the State of Georgia as Count Ten of his motion for a writ of habeas corpus before the Superior Court of Butts County. The Superior Court, Crumbley, J., ruled that the Petitioner had not met his burden of showing cause for actual prejudice by a preponderance of the evidence.
2. Petitioner raised the claim that he was tried by a jury chosen from traverse jury pools which were composed in violation of the Constitution of the United States and the laws and Constitution of the State of Georgia as Count Nine (sic)of his motion for a writ of habeas corpus before the Superior Court of Butts County. The Superior Court, Crumbley, J., ruled that Petitioner's complaint was without merit.
3. Petitioner raised the claim that the trial court's failure to grant the Petitioner's motion prior to his second trial for funds to investigate and show a hisotry of systematic exclsuion of cognizable groups of jury pools in Polk County violated the Petitioner's right to fully present his challenge to the grand and traverse jury pools, to a fair trial, due process and equal protection of law and right to a jury composed of a representa-

tive cross-section of the community as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as Count Five, Motion for a Writ of Habeas Corpus before the Superior Court of Butts County. The Superior Court, Crumbley, J., ruled that the granting or denial of the Petitioner's motion was within the sound discretion of the trial court and that the Petitioner presented no evidence of an abuse of this discretion.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. THE PETITIONER WAS INDICTED BY AN UNCONSTITUTIONALLY COMPOSED GRAND JURY SINCE IT WAS DRAWN FROM A GRAND JURY POOL WHICH WAS COMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE LAWS AND CONSTITUTION OF THE STATE OF GEORGIA.

The following cognizable classes in Polk County were and are systematically excluded from Polk County's Grand Jury pool:

[A] There was an intentional, discriminatory and systematic exclusion of young adults ages 18 to 30 on the grand jury pool from which the jurors were selected, who heard evidence against the Petitioner.

[B] There was an intentional, discriminatory, and systematic exclusion of women from the grand jury pool from which the jurors who heard evidence against the Petitioner were selected.

[C] There was an intentional, discriminatory, and systematic exclusion of blacks from the grand jury pool from which the jurors were selected who heard evidence against the Petitioner.

[D] There was an intentional, discriminatory, and systematic exclusion of blacks aged 18 to 30 from the grand jury pool from which the jurors were selected who heard evidence against the Petitioner.

At the habeas corpus hearing, the Petitioner presented the testimony of a witness who was directly involved in the challenges to the array of the grand jury and traverse jury in the case of State v. Messer, Superior Court of Polk County, Criminal Indictment No. 2072. As a result of that challenge, the indictment was quashed, the jury commissioners either resigned or were relieved of their duties, and new jury pools were drawn.

The witness who testified stated that her research disclosed the following with regard to the 1975 and 1977 grand jury pools in Polk County:

	1975 GRAND JURY		TOTAL JURORS: 543
Class	Number	%Rep on Panel	%Rep in Population
Males	448	82.5	47.5
Females	95	17.0	52.5
Caucasian	488	89.8	84.3
Blacks	55	10.1	15.7
Age Groups			
Under 30	31	6.5	23.9
30 - 64	385	80.2	76.1
65 and over	64	13.3	76.1

	1977 GRAND JURY		TOTAL JURORS: 576
Class	Number	%Rep on Panel	%Rep in Population
Males	471	81.8	47.5
Females	103	17.8	52.5
Caucasian	526	91.3	84.3
Blacks	50	8.6	15.7
Age Groups			
Under 30	24	4.6	23.9
30 - 64	413	80.3	76.1
65 and over	77	14.9	----

The 1975 Polk County Grand Jury, as the above table demonstrates, consisted of a gross underrepresentation of blacks and women. In regard to women, we have a disparity between an approximately 53% female population and an approximately 17% female representation on the grand jury. We have a black disparity between approximately 16% in the population and approximately 10% represented on the grand jury. The disparity with regard to age groups is similar.

The 1977 Polk County Grand Jury, as the table demonstrates, also reflected a gross underrepresentation of blacks and women. In regard to women, we have a disparity between approximately 53% in the population as compared to approximately 18% on the grand jury. We have a black disparity between approximately 16% in the population and approximately 8% representation on the grand jury. Again, the disparity with regard to age groups is similar.

The Petitioner therefore has established that a prima facie case exists as defined in Castaneda v. Partida, 430 U.S. 482 (1977) and Rose v. Mitchell, 99 S.Ct. 2993 (1979).

The exclusion of the aforementioned identifiable classes is a violation of the rights guaranteed the Petitioner by the Constitution of the State of Georgia, Art. I, Sec. I, Pars. II, III, V, and XXV (Ga. Code Annotated §2-103, 2-105 and 2-125), and by 18 U.S.C. §243 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

2. THE PETITIONER WAS TRIED AT BOTH TRIALS BY UNCONSTITUTIONALLY CHOSEN JURIES SINCE THEY WERE CHOSEN FROM TRAVERSE JURY POOLS WHICH WERE COMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF GEORGIA.

Again, the witness who testified for the Petitioner at the habeas corpus hearing stated that her research disclosed the following with regard to the 1975 and 1977 traverse jury pools in Polk County, Georgia.

1975 TRAVERSE JURY			TOTAL JURORS: 1827
Class	Number	%Rep on Panel	%Rep in Population
Males	1290	70.6	47.5
Females	533	29.2	52.5
Caucasian	1712	93.7	84.3
Blacks	115	6.2	15.7
Age Groups			
Under 30	155	9.5	23.9
30 - 64	1262	77.4	76.1
65 and over	213	13.0	----

1977 TRAVERSE JURY			TOTAL JURORS: 2047
Class	Number	%Rep on Panel	%Rep in Population
Males	1427	69.7	47.5
Females	612	29.8	52.5
Caucasian	1918	93.7	84.3
Blacks	125	6.1	15.7
Age Groups			
Under 30	132	7.2	23.9
30 - 64	1440	78.3	76.1
65 and over	263	14.3	----

The Petitioners court appointed trial counsel challenged this array (1977) prior to his second trial.

The Petitioner's statistical evidence consisted of a 1970 U.S. Department of Commerce census for Polk County, showing a population of 29,656; 45.8% male, 54.2% female, 86.2% white and 13.7% black. [It should be noted that the witness testifying at the habeas corpus hearing utilized Census Bureau figures, hence, the discrepancy.]

Petitioner's trial counsel conducted a survey of the 1977 traverse jury list. However, he was unable to classify 152 names by gender or race. See Bowen v. State, 244 Ga. 499.

The trial court overruled the challenge on the ground that the 152 unclassifiable names could significantly change the black-white

and male-female percentages.

In its review, the Supreme Court of Georgia held:

"...the trial court was also authorized in overruling the remaining two grounds of the appellant's jury challenge, because the appellant failed to show that the disparity between the percentages of blacks and women in the population and on the traverse jury panel was 'significant'. Under the appellant's survey, 152 out of 2,029 names on the traverse jury panel were unclassifiable. This constituted approximately 7.5% of the traverse jury panel, a significant percentage. Consequently we hold that the appellant failed to establish an impermissible disparity between the percentages of blacks and women on the traverse jury panel and the source of these jurors in the population." Bowen v. State, 244 Ga. 499, 500.

The statistics persented by the witness testifying for the Petitioner at the habeas corpus hearing were the same figures presented to the trial court in Messer, supra. It is readily apparent that they support the initial findings made by the Petitioner's trial counsel. The additional disclosure of the sex and race of the previously 152 unclassified jurors resulted in no change in the alleged disparity.

The Petitioner contends that the traverse jury list of Polk County reveal a history and pattern of intentional, discriminatory and systematic exclusion of blacks, women and individuals under the age of 30.

The exclusion of the aforementioned identifiable classes is a violation of the rights guaranteed the Petitioner by the Constitution of the State of Georgia, Art. I, Sec. I, Pars. II, III, V, and XXV (Ga. Code Annotated §2-103, 2-105 and 2-125),

and by 18 U.S.C. §243 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. THE TRIAL COURT'S FAILURE TO GRANT THE PETITIONER'S MOTION FOR FUNDS TO INVESTIGATE AND SHOW A HISTORY OF SYSTEMATIC EXCLUSION OF COGNIZABLE GROUPS FROM JURY POOLS IN POLK COUNTY, GEORGIA, VIOLATED THE PETITIONER'S RIGHT TO FULLY PRESENT HIS CHALLENGE TO THE TRAVERSE JURY BEFORE HIS SECOND TRIAL, RIGHT TO A FAIR TRIAL, DUE PROCESS AND EQUAL PROTECTION OF LAW AND RIGHT TO A JURY COMPOSED OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

As stated earlier, in a subsequent case in Polk County, with a non-indigent defendant, State v. Messer, supra, evidence of a history of systematic exclusion was investigated and presented.

The witness involved in this investigation testified for the Petitioner at his habeas hearing and stated that it took her approximately two (2) months, working full time, to complete her survey on behalf of Mr. Messer. She was paid for her time and effort.

The Petitioner, an indigent black man, had no funds to employ anyone. His court appointed trial attorney requested funds to present and develop his challenge and the same was denied by the trial court. This denial violated his right to fully present his challenge to the traverse jury prior to his second trial.

Therefore, it is respectfully submitted that this Court should issue a Writ of Certiorari to the Superior Court of Butts County and reverse the Petitioner's conviction for murder and rape and vacate his sentence of death.

Respectfully submitted,

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Appendix A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CHARLIE BENSON BOWEN,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 4780
	:	
WALTER ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

It appears that Counsel for Petitioner did not receive a copy of the Court's final Order in this Habeas proceeding and as a result was not able to make timely application for a certificate of probable cause. Further, it appears that Petitioner's failure to receive a copy of the Order is due to a problem with delivery of the mails, not due to any fault of Petitioner, his Counsel, or the Clerk of this Court. In view of the peculiar nature of death penalty Habeas Corpus proceedings, the Court hereby re-files the Order.

This 27th day of April, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CHARLIE BENSON BOWEN,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 4780
	:	
WALTER ZANT,	:	
SUPERINTENDENT,	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenged the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Polk County. Bowen was convicted of Murder and Rape. He was sentenced to death for Murder and life imprisonment for Rape. His convictions and life sentence for Rape were affirmed by the Supreme Court. The death sentence was vacated and the case remanded to the Superior Court for a new trial solely on the issue of punishment for Murder. Bowen v. State, 241 Ga. 492 (1978). On retrial Petitioner was resententenced to death, and the Supreme Court affirmed the death sentence. Bowen v. State, 244 Ga. 495 (1979). Certiorari was denied by the Supreme Court of the United States.

The Petition contains 16 numbered counts which allege substantive claims for relief. The Court will rule on those counts for relief by paragraphs

corresponding numerically to the counts in the Petition.

The record in this habeas case consists of the transcript of the proceedings before this Court on January 20, 1981; the transcripts and records of both of Petitioner's trials and challenge to the array in Polk County Superior Court.

1.

In Count 1, Petitioner alleges violation of his constitutional rights by the impermissibly vague and overbroad application of Ga. Code Ann. §27-2534.1(b)(7) as the sole aggravating circumstance found in Petitioner's case.

The portion of the charge to the jury concerning statutory aggravating circumstance(s) is set out in Appendix I. (See Appendix I.)

Petitioner relies upon Godfrey v. Georgia, ____U.S. ____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) in contending the instant case involved the standardless and unchanneled imposition of the death penalty by a basically uninstructed jury. It is true that Godfrey requires that a jury charge be tailored in its application of the §(b)(7) statutory aggravating circumstance to avoid arbitrary and capricious infliction of the death penalty, but Godfrey is readily distinguishable.

First, the jury in Godfrey was given "no guidance concerning the meaning of any of §(b)(7)'s terms" such that the jury's interpretation could only by the subject of "sheer speculation". 64 L.Ed.2d at 407. While the jury

instruction in this case defined "aggravated battery", it contains no definition of torture. But "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. Blake v. State, 239 Ga. 292, 299 (1977). Torture occurs when the victim is subjected to an aggravated battery. Hance v. State, 245 Ga. 856, 861 (1980). There was, in this case, ample evidence from which the jury could conclude that the victim was subjected to both an aggravated battery and torture prior to death. The Court's charge, while not as complete as it might have been, did not under the facts of this case leave the jury without a standard. The jury could rely on their own knowledge and experience in deciding whether this victim suffered prior to her death. The evidence supports the conclusion reached by the jury. The victim was raped and received fourteen stab wounds. Bowen v. State, 241 Ga. at 492-493. Godfrey v. Georgia established that torture occurs when the victim is subjected to serious physical abuse before death. Hance v. State, supra; Baker v. State, 246 Ga. 259 (1980). Serious sexual abuse may be found to constitute serious physical abuse. House v. State, 232 Ga. 140 (1974); Hance v. State, supra; Collins v. State, 246 Ga. 261 (1980). Thus, the evidence supports the jury's finding of the (b)(7) aggravating circumstance in Petitioner's case.

There is also no merit in Petitioner's argument that the only instruction the jury received as to

"torture" was from the prosecution in his closing remarks. (See T.2d Trial 561). The effect upon the jury, if any, was dispelled by the trial court's instructions: "The law you take from the court as given you in charge by the court...." (T.2d Trial 605). See Thomas v. State, 240 Ga. 393, 402(7)(1977).

In summary, the allegations in Count 1 are found to be without merit.

2.

In Count 2, Petitioner argues that the jury instruction improperly shifted the burden of proof as to Petitioner's intent relying on Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The jury instruction in question, from Petitioner's first trial, reads as follows:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted."

(T.1st Trial 458).

Sandstrom is readily distinguished on the ground that Sandstrom's jury "were not told that the presumption could be rebutted...." 61 L.Ed.2d at 46. The jury instruction in the case at hand clearly indicates that the presumption created was merely a permissive one. Such permissive presumptions have been held valid. Skrine v. State, 244 Ga. 520 (1978); Moses v. State, 245 Ga. 180 (1980).

The allegation in Count 2 is found to be without merit.

3.

In Count 3, Petitioner argues that he was denied effective assistance of counsel in violation of the Georgia Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

At the habeas hearing the Court heard the testimony of Mr. William J. Perry, Defense Counsel for Petitioner at both trials and on appeal. (H.T. 81; 92). Mr. Perry graduated from Emory University Law School in 1950. (H.T. 80). He served in the Navy from 1951 until 1973, during which time he was in the J.A.G. Corps for twenty years. (H.T. 80-81). Since 1973, Mr. Perry has been in general practice in Rockmart, Georgia, handling both criminal and civil cases. (H.T. 80-81). Although Mr. Perry had never before defended a murder case, he had handled one capital case, a mutiny case, while in the military. (H.T. 116).

Petitioner cites five instances in which counsel was allegedly ineffective. The Court has examined the

evidence submitted and concluded the following were permissible trial tactics:

(1) Failure to file a challenge to the grand and traverse juries prior to Petitioner's first trial. Counsel testified that the idea of filing a challenge did not occur to him. (H.T. 89). However, he did file a challenge to the jury prior to Petitioner's second trial. Bowen v. State, supra at 498. Failure to challenge arrays of grand and traverse juries alone is not a ground of ineffective assistance or "cause" within the meaning of Ga. Code Ann. §50-127(1). Goodwin v. Hopper, 243 Ga. 193(2)(1978); Birt v. Hopper, 245 Ga. 221(2)(1980); Zant v. Campbell, 245 Ga. 368(2)(1980). While counsel's failure to file a challenge before the first trial may have been a mistake, "[s]uch a mistake does not warrant a finding of ineffective assistance of counsel.... The law does not require perfection of counsel...." Durham v. State, 239 Ga. 697, 701 (1977); Zant v. Campbell, supra.

Counsel did file a jury challenge before the second sentencing trial. Its denial was affirmed by the Supreme Court. Bowen v. State, 244 Ga. at 498.

(2) Failure to file any pretrial motions before the first trial except for a Motion for Independent Psychiatric Exam. Counsel testified that he filed a Motion for Psychiatric Evaluation of Petitioner. (H.T. 83). He went to Central State Hospital and talked with Dr. Delatorre. (H.T. 83). He also consulted extensively with Dr. Bowling who had treated Petitioner

at Northwest Georgia Regional Hospital. (H.T. 83). Counsel concluded that Petitioner's only defense was insanity. (H.T. 84). Counsel filed a Motion for Examination by a psychiatrist. (H.T. 84). Since the report that ensued dealt only with Petitioner's competency at the time of trial and not at the time of the incident, Counsel made a new motion for an independent psychiatric exam. (H.T. 84). The motion was denied. (H.T. 84). Decisions on what trial motions should be made are included in the realm of strategies and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). Fortson v. State, 240 Ga. 5 (1977). That Petitioner's current counsel disagree with trial counsel's decisions does not require a finding that trial counsel's representation amounted to ineffective assistance. Berryhill v. Ricketts, 242 Ga. 447(3)(1978).

(3) Failure to file a Motion to Suppress Petitioner's statements and evidence found therefrom. Counsel testified that he learned Petitioner had been questioned at Northwest Georgia Regional Hospital but no records were made of that conversation. (H.T. 86;104). Counsel did secure the information contained in a tape of Petitioner's statements in a conversation with G.B.I. agents at the Polk County Jail before Counsel was appointed to the case. (H.T. 87). The transcript of the tape was erroneous and was not introduced as evidence because Counsel had notified the prosecution

he would object to its introduction. (H.T. 87). Counsel stated that he did not file a Motion to Suppress because he thought it would be overruled. (H.T. 88). He decided that if Petitioner's confession were to be admitted, then the tape would be best because it demonstrated the halting manner of Petitioner's description and showed that his thinking was muddled. (H.T. 88). Counsel's decision appears to be a proper one and was a decision within his authority to make. Reid v. State, supra. The Court cannot conclude that this failure to move to suppress Petitioner's statements, freely and voluntarily given, (T. 1st Trial 148), constitute ineffective assistance of counsel.

(4) Failure to conduct an adequate voir dire examination of jurors at either trial. Counsel testified that his strategy was geared to a "country county". (H.T. 90). He did not ask many voir dire questions because in that county "it generally is not the thing to do". (H.T. 90). He also knew most of the jurors and felt that his questions and knowledge gave him a good insight into the people. (H.T. 90). He also asked few questions about prejudice because he did not want to create any adverse sentiment. (H.T. 90-91). What jurors to accept or strike being well within trial counsel's discretion, Reid v. State, supra, the Court does not hold that Counsel's voir dire examination amounted to ineffective assistance.

(5) Failure to present effectively his challenge to the traverse jury in Petitioner's second trial in

that he failed to identify approximately 152 names in the jury pool. (See Bowen v. State, 244 Ga. 495 (4)(1979). The witness who conducted the survey of the traverse jury had testified that the 152 unclassifiables were either people "who had moved or who had died", 244 Ga. at 499. At the habeas hearing, Petitioner presented the testimony of Mrs. Gay Astin who had conducted a survey of the same jury pool for a subsequent case in Polk County in which the jury challenge prevailed. State v. Messer, Superior Court of Polk County, Criminal Action No. 2072. Mrs. Astin was given a list of the 152 names by Mr. Perry's secretary. (H.T. 34). Mrs. Astin claimed to have identified the 152 names by finding "older cards" in "another drawer" and had been told about an updating of the voter registration list (H.T. 30-31), but Petitioner presented no probative evidence establishing that these were the same "152 unclassifiables" or whether these people were even in the jury box at the time the jury challenge was done. Further, Mrs. Astin testified that her work papers had been lost, (H.T. 56-57), so there is no way to verify her information. The Court concludes that Petitioner has not met his burden of showing by a preponderance of the evidence that trial counsel could have successfully presented the traverse jury challenge. In addition, the issue of whether trial counsel was successful constitutes the kind of hindsight which has

never provided the basis for ineffective assistance claims. MacKenna v. Ellis, 280 F.Ed.592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

The Sixth Amendment right to counsel means "...not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance." MacKenna v. Ellis, supra; Pitts v. Glass, supra. Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, supra; Hawes v. State, 240 Ga. 327, 329-330 (1977).

Petitioner's trial counsel easily meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner, considering the difficulty of the case. Counsel's testimony shows him to be an intelligent and concerned defense lawyer. The effort he put forth for Petitioner was certainly reasonably effective within the meaning of the standard.

The allegations in Count 3 are found to be without merit.

4.

In Count 4, Petitioner complains of constitutional deprivation due to the trial court's refusal to grant Petitioner's pretrial motion for an independent psychiatric exam.

The appointment of a psychiatrist, in the absence of any special plea of insanity, is within the discretion of the trial judge, as is the appointment of any expert

witness. Westbrook v. State, 242 Ga. 151 (1978); Crenshaw v. State, 244 Ga. 430 (1979). Denial of the Motion for the appointment of an expert will not be reversed in the absence of an abuse of that discretion. Patterson v. State, 239 Ga. 409 (1977); Westbrook v. State, supra.

In the instant case, the trial court had already ordered a psychiatric examination for Petitioner. (Record 5).

It was not error for the Court to deny the Motion for a second exam. Crenshaw v. State, supra.

The allegation in Count 4 is found to be without merit.

5.

In Count 5, Petitioner alleges that denial of his motion for funds to investigate and show discrimination in the selection of jury pools violated his constitutional rights.

The granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court. Patterson v. State, supra; Thomas v. State, 240 Ga. 393(1)(1977). Petitioner has presented no evidence of an abuse of this discretion by the trial court.

The complaint in Count 5 is found to be without merit.

6.

In Count 6, Petitioner argues that the imposition of his death sentence constitutes cruel and unusual

punishment in violation of his Eighth and Fourteenth Amendment rights because Petitioner was suffering from mental disorders at the time of the offense.

The state-appointed psychiatrist concluded that Petitioner knew the difference between right and wrong at the time of the offense. (T.1st Trial 400-401). Another psychiatrist who had examined Petitioner concluded Petitioner was unable to distinguish right from wrong at the time of the incident. (T.1st Trial 363). Despite the conflicting evidence on this point, the jury was authorized in its role as fact finder to conclude that Petitioner was sane at the time of the incident.

As to Petitoner's motion for funds for expert witnesses, a habeas petitioner has no right to state funds for expert witnesses, investigation, or legal counsel. Pulliam v. Balkcom, 245 Ga. 99 (1980).

The allegations in Count 6 are found to be without merit.

7.

Petitioner contends in Count 7 that he was denied a fair trial by the prosecutor's argument that raised the possibility of Petitioner being paroled.

The Court has examined the statements of the prosecutor which are set out in Appendix II. (See Appendix II).

The prosecutor should refrain from making remarks which would divert the jury from its duty to decide the case on the evidence by making predictions of the consequences of the jury's verdict. Prevatte v. State,

233 Ga. 929(6)(1975); Fleming v. State, 240 Ga. 142 (6)(1977). Where there has been found to be reversible error, the prosecutor's remarks referred to Defendant's right to appellate review with the possibility that the jury's verdict could be set aside. Prevatte v. State, supra; Fleming v. State, supra. The impermissible effect was to encourage the jury to take less than full responsibility for their task in deciding life and death. Prevatte v. State, supra; Fleming v. State, supra.

The prosecutor's remarks in the instant case do not amount to an improper shifting of the responsibility of the sentencing decision. To the contrary, the remarks point to the seriousness of what the jury was being asked to do.

That the prosecutor suggested that anything less than a death penalty made it possible for the Defendant to return to society is within the bounds of permissible argument in the sentencing phase of a death penalty case.

The complaint in Count 7 is found to be without merit.

8.

In Count 8, Petitioner contends that his constitutional rights were violated by the trial court's response to the jury's question concerning parole.

When asked about a life sentence possibly ending in a period as short as seven years, the trial court responded, "You are not to concern yourselves with any punishment other than the two that I have given you.

That is not a part of your deliberations or not a part of your punishment, any punishment, other than the two punishments which I have described to you. They are the only thing that can enter your deliberations other than the evidence which has been produced before you. I cannot instruct you concerning anything other than what I have already instructed you as to the two punishments, and anything outside of that as a punishment is for your consideration." (T.2d Trial 612).

The trial court's refusal to comment on parole maintained the neutrality required by Ga. Code Ann. §27-2206 and therefore was proper. Thomas v. State, 240 Ga. 393(6)(1977); Willis v. State, 243 Ga. 185 (6)(1979); Tucker v. State, 244 Ga. 721(11)(1979).

There is no merit in the allegation in Count 8.

9.

In Count 9, Petitioner contends that admission of his statements and evidence found as a result violated his Fifth, Eighth, and Fourteenth Amendment rights. He complains that his statements were not voluntarily given.

The trial court conducted a Jackson-Denno hearing to determine the voluntariness of the statements and admitted them into evidence. (T.1st Trial 148).

Petitioner argues that the trial court ruled on the admissibility of the statements before Defense Counsel had the chance to complete his cross-examination of the sheriff concerning the statements. The burden of showing voluntariness is on the State, and the

standard of proof necessary is preponderance of the evidence. Pierce v. State, 235 Ga. 237 (1975); Lee v. State, 239 Ga. 769 (1977). Once the State makes a prima facie showing of voluntariness, the statement is admitted and the issue of voluntariness becomes a jury question. Moore v. State, 221 Ga. 636(3)(1965); Edwards v. State, 236 Ga. 486 (1976); Meyer v. State, 150 Ga. App. 613 (1979). A reading of the transcript indicates the trial court found that the State had carried its burden of a prima facie showing of voluntariness.

> "I think the testimony of the sheriff makes clear that as a preliminary matter I will have to find that the evidence, that is any statement, would be admissible insofar as the constitutional warning and the voluntariness of the admissions. His testimony alone is sufficient and I would say this even if you had rebutting evidence. I'm not ruling that that evidence would not be admissible at a later time or possibly even now if you had it here but I'm holding now as a matter of fact that the evidence of the sheriff is sufficient to lay the foundation for allowing this in evidence at this time. I am holding that it does not meet the standard required for admissibility under the constitutional warning and that it is sufficient.
>
> MR. PERRY: Then I shall have time later to present this evidence to be considered by the court.
>
> THE COURT: I'll certainly hear from you concerning that at what ever time you offer it.

MR. PERRY: I have no further questions.

THE COURT: Do you have anything further before the jury comes back?

MR. PERRY: No sir."

(T. 1st Trial 148).

The transcript does not indicate that the Court refused to allow Defendant to present evidence on the issue. It appears that Defendant had nothing available at the time. While the Court's remark that the State's evidence would be sufficient regardless of what Defendant might present is perhaps unfortunate, it is harmless in view of the failure of Defendant to offer any evidence on the voluntariness issue.

The trial court's determination was not erroneous. In these circumstances, the determination in favor of admissibility by the trial court is accepted. Johnson v. State, 233 Ga. 58 (1974); Hance v. State, 245 Ga. 856 (1980).

The complaint in Count 9 is without merit.

10.

In Count 10, Petitioner contends that he was indicted by an unconstitutionally composed grand jury.

In Georgia, a grand jury composition must be challenged prior to indictment unless the Defendant had no actual or constructive notice of the illegality; failure to challenge is deemed a waiver. Jones v. State, 234 Ga. 283 (1968); Young v. State, 232 Ga. 285 (1974). To bring a challenge in a habeas

proceeding, the petitioner must make a showing of actual prejudice. Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

In the instant case Petitioner has not met his burden of showing cause or actual prejudice by a preponderance of the evidence. The Court has ruled in Paragraph 3(1) above that the failure of Petitioner's counsel to challenge the jury does not constitute ineffective assistance of counsel. Accordingly, Petitioner has waived any right to challenge the grand jury.

The allegation in Count 10 is found to be without merit.

9. [Sic]

In Count 9 [sic], Petitioner contends that he was convicted by an unconstitutionally composed traverse jury.

See Paragraph 3(5).

This complaint is without merit.

11.

In Count 11, Petitioner contends that the action of the prosecutor in striking all black persons from the trial juries deprived him of his constitutional rights.

Petitioner's defense counsel, Mr. Perry, testified at the habeas hearing that the prosecutor had a history of systematically eliminating black persons from trial juries. (H.T. 117). Mr. Perren, prosecutor in both of Petitioner's trials, testified and clearly denied this allegation. (H.T. 120). Petitioner presented

no other proof than Mr. Perry's testimony and cited no authority in support of this contention. The use of peremptory strikes by the prosecution to exclude a class of people does not constitute a denial of constitutional rights under any rule of law of which the Court is aware.

The allegation in Count 11 is found to be without merit.

12.

In Count 12, Petitioner alleges that the trial court's charge on mitigating circumstances was defective.

In reviewing the trial court's refusal to give a requested charge on mitigating circumstances, the Supreme Court concluded that the trial court's instructions on mitigating circumstances were in conformity with other decisions. Bowen v. State, 244 Ga. 495 (2) (1979).

Petitioner also contends that the jury thought its verdict was merely advisory. This is not true. In the charge to the jury, the trial court expressly stated: "If you recommend the imposition of the sentence of death the court will sentence the defendant to death." (T. 2d Trial 609).

The allegations in Count 12 are without merit.

13.

In Count 13, Petitioner alleges that the death

penalty is applied arbitrarily, capriciously and whimsically in the State of Georgia.

There is no evidence to support this argument. Count 13 is found to be without merit.

14.

In Count 14, Petitioner argues his death sentence is being exacted pursuant to a pattern and practice of Georgia prosecutors, courts, juries and Governors to discriminate on grounds of race, sex, and poverty.

There is no evidence to support this argument. Count 14 is without merit.

15.

In Count 15, Petitioner complains that the death sentence is an excessive penalty.

There is no evidence to support this allegation. Count 15 is without merit.

16.

Petitioner contends in Count 16 that he was convicted by a jury unrepresentative and biased in favor of the prosecution.

The Supreme Court rejected this "prosecution prone" argument in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). See also Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327(5)(1977).

The allegation in Count 16 is found to be without merit.

WHEREFORE, all allegations in the Petition having been found without merit, the Petition is denied.

This 20th day of March, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX I

"The law provides that when a person is convicted of an offense that may be punished by death the sentence of death shall not be imposed unless the jury's verdict includes a finding beyond a reasonable doubt of at least one statutory aggravating circumstance and a recommendation that the death sentence be imposed. A reasonable doubt means exactly what it says, it is doubt that is founded upon reason. A reasonable doubt is one that may grow out of the evidence or want of evidence. A doubt reasonably and fairly entertained as opposed to a vague conjectural or fanciful doubt.

When a statutory aggravating circumstance is found beyond a reasonable doubt and a recommendation of death is made the court shall sentence the defendant to death. When a sentence of death is not recommended by the jury the jury shall sentence the defendant to life imprisonment. Unless you find one of the statutory aggravating circumstances you cannot consider a death sentence. The statutory aggravating circumstances which the state contends exists in this case are that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery.

Code Section 26-1305 defines aggravated battery. "A person commits aggravated battery when he maliciously causes bodily harm to another either by depriving him of a member of his body or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

In arriving at your verdict in this case you will consider the evidence as to the mitigating circumstances which the defendant contends exists in this case including evidence of good character or any other mitigating circumstances you find from the evidence. You will also consider the evidence as to the statutory aggravated circumstances which the state contends exists in the case. If you find beyond a reasonable doubt that the state has proved the existence in this case of either one or more aggravating circumstances as contended by the state and as given you in charge by the court then you would be authorized to recommend the imposition of a sentence of death but you would not be required to do so. If you recommend the imposition of the sentence of death the court will sentence the defendant to death. If you should find beyond a reasonable doubt that the state has proved the existence in this case of one or more aggravating circumstances contended by the state and given you in charge by the court you would also be authorized to fix the punishment of the defendant at life imprisonment. This recommendation you may make for any reason that is satisfactory to you. If you do not find beyond a reasonable doubt that the state has proved the existence of any of the statutory aggravating circumstances,that which the court has charged you, you would not be authorized to consider the penalty of death but fix punishment at life imprisonment and the court will then be required to sentence the defendant to life imprisonment. (T.2d Trial 607-609).

APPENDIX II

"We ought to let him go down there to Goodyear. I guess, and go back down there to doffing and twisting, go back to his wife, and go back to be a rehabilitated man. If you want him to fine but I don't want him in my society.

(T.2d. Trial 564).

And now we come up here with this idea that here is a man that even though he knew that he himself... even though he was convicted in his own heart and he desired to die and we are approached with the proposition that he is subject to be rehabilitated and released back into our society.

Yeah, I guess he can be rehabilitated. Hitler could have been. I believe in about six or eight months if I'd had him chained to a wall and talked to him and beat him on one side of the head for a while with a stick telling him you believe this don't you then beat him on the other side with a stick telling him you believe that don't you I believe I could have rehabilitated Hitler.

Yeah, it's conceivable that he could come back into society. It's conceivable that he can go back to work at Goodyear mills in the twister room. Yeah, it's conceivable that he can go see Angie some more. Yeah, it's conceivable that he can be let out to gamble, it's conceivable that he can be let out to drink his beer and smoke his marijuana, and it's conceivable that he could pick up another little twelve year old girl, if you want him to all you've got to do is...

Mr. Perry...I'm going to object to this line or [sic] argument, Your Honor, I think this is going beyond the bounds of a fair argument and I suggest that he be directed to cease from that.

The Court: I overrule your objection.

Mr. Perren: They say he can come back into society. Some of them would welcome him with open arms but I'm not. They can call me what they wish, unchristian or whatever they want to. I'm not willing to. I'm willing to abide by your determination because it's a determination you must make. (T.2nd Trial 576-577).

Application No. 1685

Appendix B

SUPREME COURT OF GEORGIA

ATLANTA. September 8, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CHARLIE B. BOWEN V. WALTER B. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. Jordan, C.J., Marshall, Clarke, Smith and Gregory, JJ., concur. Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

RECEIVED
JAN 11 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5844

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLIE B. BOWEN,

Petitioner

vs.

WALTER F. ZANT, WARDEN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

GEORGE M. WEAVER
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QUESTIONS PRESENTED

1. Has petitioner, who under Georgia law waived any issue regarding the composition of the grand jury which indicted him, shown that he was actually prejudiced by its alleged unconstitutional composition?

2. Has petitioner, who under Georgia law waived any issue regarding the composition of the traverse jury before which he was convicted, shown that he was actually prejudiced by its alleged unconstitutional composition?

3. Before his sentencing retrial did petitioner demonstrate that the traverse jury was unconstitutionally composed?

4. Did the trial court before which petitioner was tried for resentencing commit constitutional error in denying petitioner's motion for funds to develop his challenge to the array of the traverse jury?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

A. PROCEEDINGS IN THE COURT BELOW 2

B. STATEMENT OF FACTS. 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. COMPOSITION OF GRAND JURY. 4

B. COMPOSITION OF TRAVERSE JURIES 5

1. TRAVERSE JURY IN PETITIONER'S FIRST TRIAL 5

2. TRAVERSE JURY IN PETITIONER'S RETRIAL . . . 5

C. MOTION FOR FUNDS 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

CASES	PAGE
Barrow v. State, 239 Ga. 162 (1977)	6
Bowen v. State, 241 Ga. 492 (1978)	2
Bowen v. State, 244 Ga. 495 (1975), cert. denied, 446 U.S. 970	2, 5, 7
Bowen v. Zant, Habeas Corpus No. 4780 Superior Ct. Butts County, March 20, 1981)	2, 4, 7
Duren v. Missouri, 439 U.S. 357 (1979)	6, 8
Floyd v. United States, 429 U.S. 852 (1976).	6
Francis v. Henderson, 425 U.S. 536 (1976)	4
Godfrey v. State, 243 Ga. 302 (1979), rev'd in part on other grounds, 446 U.S. 420 (1980)	4
Hill v. Stynchcombe, 225 Ga. 122 (1969)	5
Sanders v. State, 255 Ga. 425 (1975), cert. denied, 425 U.S. 976	4, 7
State v. Davis, 241 Ga. 376 (1978)	6
Sullivan v. State, 246 Ga. 426 (1980).	4
Swain v. Alabama, 380 U.S. 202 (1965)	6
United States v. Diggs, 522 F.2d 1310, n. 12 (D.C. Cir. 1975), cert. denied sub nom.	6
Whitaker v. State, 246 Ga. 163 (1980)	9

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

On August 22, 1977, the Polk County, Georgia, grand jury indicted petitioner for the rape and murder of Sheila Denise Young. After a jury trial, petitioner was convicted of both rape and murder. He was sentenced to life imprisonment on the rape charge and death on the murder charge. The Georgia Supreme Court upheld petitioner's convictions and life sentence but reversed his death sentence and remanded the case for a new sentencing trial. Bowen v. State, 241 Ga. 492 (1978). After his retrial on the issue of punishment, petitioner was, on September 15, 1978, again sentenced to death. The Georgia Supreme Court affirmed the new death sentence. Bowen v. State, 244 Ga. 495 (1979), cert. denied, 446 U.S. 970.

Subsequently, petitioner filed a petition for the writ of habeas corpus in the Superior Court of Butts County, Georgia. In his petition he raised each of the issues he pursues in this Court. After a hearing, his petition was denied. Bowen v. Zant, Habeas Corpus No. 4780 (Superior Ct. Butts County, March 20, 1981).

B. STATEMENT OF FACTS

A detailed statement of facts can be found in the first opinion of the Georgia Supreme Court. Bowen v. State, 241 Ga. 492 (1978).

SUMMARY OF ARGUMENT

By failing to challenge the array of the grand jury before indictment, petitioner waived any issue as to the constitutionality of its composition. Moreover, he has not demonstrated, as he must in order to qualify for federal relief, that he was actually prejudiced by the composition of the grand jury. By failing to challenge the array of his first traverse jury, petitioner waived any issue as to the constitutionality of its composition. And, he has not demonstrated that he was actually prejudiced by the composition of the jury. Moreover, petitioner failed, in his challenge to the array of his second traverse jury, to show that it was unconstitutionally composed. Finally, petitioner has not shown that the trial court before which he was tried for resentencing, committed any constitutional error in denying a motion for funds. Petitioner has not shown that his challenge to the array of his second traverse jury was rendered defective by his lack of funds on account of his indigency.

ARGUMENT

A. COMPOSITION OF GRAND JURY

Petitioner first raises the composition of the grand jury that indicted him. He contends that adultsages 18-30, women, and blacks were unconstitutionally underrepresented on the jury list from which the grand jury was drawn.

Petitioner, however, waived this issue by failing to raise it before indictment. Under Georgia law, a challenge to the array of a grand jury must be made before indictment unless the defendant is able to show that at the time of indictment he had neither actual nor constructive knowledge of the composition of the grand jury. Otherwise, a defendant waives the issue. Sullivan v. State, 246 Ga. 426, 427 (1980); Godfrey v. State, 243 Ga. 302, 305 (1979), rev'd in part on other grounds, 446 U.S. 420 (1980); Sanders v. State, 235 Ga. 425, 426 (1975). Petitioner was indicted on August 22, 1977, but did not challenge the composition of the grand jury until September 3, 1980, when he filed his state habeas corpus petition.

Unless one who has waived his challenge to the composition of a jury can show that he has suffered actual prejudice, he is not entitled to federal relief. Francis v. Henderson, 425 U.S. 536 (1976). As the Superior Court of Butts County found: "In the instant case Petitioner has not met his burden of showing cause or actual prejudice by a preponderance of the evidence." Bowen v. Zant, supra, slip op. at 17. Moreover, the habeas court found that the failure of petitioner's trial

counsel to challenge the array of his grand jury was not a basis for finding ineffective assistance. Id., slip op. at 6. Petitioner has not raised the effective assistance issue here; the habeas court's finding is, therefore, the law of this case.

For these reasons, then, the court should not grant certiorari on this issue.

B. COMPOSITION OF TRAVERSE JURIES

Petitioner also claims that the traverse juries that convicted him and sentenced him to death were drawn from unconstitutionally composed jury lists.

1. Traverse Jury in Petitioner's First Trial

By failing to challenge the array of the traverse jury that convicted him, petitioner waived his right to raise the issue later. According to Georgia law, a defendant who does not challenge the array of a traverse jury when it is put upon him waives any objection. Hill v. Stynchcombe, 225 Ga. 122, 127 (1969). By failing to challenge the array at that time, petitioner also waived this issue. Francis, supra.

2. Traverse Jury in Petitioner's Retrial

Petitioner's contention that the jury which sentenced him was drawn from an unconstitutionally composed jury list is also without merit. This issue was raised earlier in both the Georgia Supreme Court and this Court. Bowen v. State, 244 Ga. 495, 498-501 (1979), cert. denied, 446 U.S. 970.

In order to prevail on a Sixth Amendment challenge to the composition of a jury list, one must establish a prima facie case consisting of three elements. In the Court's words:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

Petitioner's claim of underrepresentation of young adults does not even meet the first element of a prima facie case. Georgia courts have consistently held that age groups are not identifiable or cognizable groups for jury composition analysis. Barrow v. State, 239 Ga. 162, 164 (1977); State v. Davis, 241 Ga. 376 (1978). Other courts have agreed. E.g., United States v. Diggs, 522 F.2d 1310, 1317 n. 12 (D.C. Cir. 1975), cert. denied sub nom., Floyd v. United States, 429 U.S. 852 (1976). Petitioner has advanced no reason to overturn this authority.

Petitioner's claim that women and blacks were underrepresented is more cogent but, nevertheless, ultimately unsuccessful. Women and blacks are, of course, distinctive community groups within the meaning of Duren. Swain v. Alabama, 380 U.S. 202 (1965); Taylor v. Louisiana, 459 U.S. 522 (1975). In view of the above-mentioned timeliness standard for filing a challenge to the array of a traverse jury, only those figures presented to the trial court at the time the challenge was made should be considered. The statistics testified to at the habeas hearing are irrelevant. The appropriate figures are set out

in the last opinion of the Georgia Supreme Court--54.2% women in the population and 29.5% women on the traverse jury list; 13.7% blacks in the population and 6.2% blacks on the jury list. Moreover, when the challenge was presented to the trial court 152 names on the jury list were unclassified. Bowen v. State, 244 Ga. at 499-501.

In veiw of the unclassified names in the presentation of the challenge to the trial court, petitioner failed to satisfy the second element of a prima facie case. The second element required of petitioner a showing that the representation of blacks and women was "not fair and reasonable in relation to the number of such persons in the community." Duren, supra, at 360. The trial court, the Georgia Supreme Court, and the habeas court all found that the failure to identify the race and sex of these 152 persons rendered the challenge defective. The habeas court also found that even at the habeas hearing, petitioner failed to establish the relevant characteristics of these persons. The habeas court also found that petitioner's trial counsel did not render ineffective assistance by failing to adequately present the challenge to the array. Bowen v. Zant, slip op. at 8-10. Petitioner has not presented the effective assistance finding to this Court. Manifestly, these lower courts were correct. The Georgia Supreme Court properly held that the evidence of underrepresentation was inconclusive. In Sanders v. State, 235 Ga. 425, 427-30 (1975), cert. denied, 425 U.S. 976, the Georgia Supreme Court similarly held that the failure to clearly identify the race and sex of all the persons on the jury list rendered the challenge defective.

Petitioner also failed to meet the third element of a prima facie case. He has not shown that any underrepresentation was due to systematic exclusion of women and blacks in the jury selection process.

To the extent that petitioner states an equal protection claim, it is successfully rebutted by evidence of good faith efforts to compose a jury list made up of a fair cross-section and evidence of the absence of any discriminatory purpose. The Court has held that such rebuttal evidence is significant for refuting an equal protection challenge to the composition of a jury. Duren, supra, at 368, n. 26, and cases cited therein. The Georgia Supreme Court has held with regard to the jury list from which the petitioner's sentencing jury was drawn, that petitioner failed in his original challenge to show discriminatory purpose. The court pointed out: that one of the six jury commissioners of Polk County was a white female and one a black male, that the voter registration list used to compose the jury list had no racial designations, that no one was excluded from the jury list because of race or sex, and that it was the aim of the commissioners to secure a fair cross-section. Petitioner offered no evidence in the hearing before the habeas court which would cast doubt on any of these points. Therefore, petitioner's equal protection challenge is without merit.

It should also be pointed out that petitioner's trial counsel, who was held to have rendered effective assistance, was satisfied with, and actually knew some of the persons on, the sentencing traverse jury. (H.T. [Habeas Transcript] 96).

For all of these reasons, the Court should deny certiorari on this issue, just as it did in the direct appeal.

C. MOTION FOR FUNDS

In the final question which petitioner presents to the Court, he contends that the trial court committed constitutional error in denying a motion for defense funds to develop a challenge to the array of the sentencing traverse jury. This contention is apparently a fall back position: petitioner argues that if the presentation of the challenge to the array was properly found to be defective, it was due to the trial court's denial of a request for funds.

Petitioner has made no showing that the denial of funds with which to investigate the composition of the jury list caused the defective presentation of the challenge. Petitioner's trial counsel testified that the failure to determine the sex and race of all the persons on the traverse jury list was a result of his underestimating the research time required and an inadvertent mistake by his secretary. (HT. 95, 99). Moreover, he testified that he expected to be paid for the time his secretary spent researching the jury list. (HT. 97-98). Also petitioner had the benefit, apparently without expense to himself or his trial counsel, of an expert statistician. (HT. 94-95). It should also be noted that the trial court did grant at least one other motion for funds--namely, one for the payment of an expert witness for psychological testing of petitioner. (HT. 93).

Georgia courts have consistently held that the provision of monies to an indigent defendant for investigation and expert witnesses is within the discretion of a trial court. Whitaker v. State, 246 Ga. 163, 164 (1980). Especially in view of his failure to suggest how he was harmed, petitioner has not shown any abuse of discretion.

For these reasons, the court should not grant certiorari on this question.

CONCLUSION

The instant petition should not be granted because the Superior Court of Butts County has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-5844

CHARLIE B. BOWEN,

Petitioner

v.

WALTER F. ZANT, Warden,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, George M. Weaver, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on January 8, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

George M. Weaver
GEORGE M. WEAVER

Sworn to and subscribed before me
this 8th day of January 1982.

Janice Wilson
NOTARY PUBLIC

My Commission Expires: August 1985